SEP 29 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 307 "B"

W. O. BOWERS, Jr. AND W. D. GORDON,
Petitioners and Appellants below,
v.
NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee Below.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	2
AUTHORITIES	4
CONCLUSION	5

INDEX OF AUTHORITIES

Forsythe v. Hammond, 166 U.S. 506, 514; 17 Sup. Ct. 665; 41 L. Ed. 1095	4
Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251; 36 Sup. Ct. 269; 60 L. Ed. 629	5
Houston Oil Co. of Texas, et al., v. Goodrich, et al., 245 U.S. 440; 38 Sup. Ct. 140; 62 L. Ed. 385	4
Layne & Bowler Corporation v. Western Well Works, Inc., et al., 261 U.S. 387, 393; 43 Sup. Ct. 422; 67 L. Ed. 712	4
Magnum Import Co. v. Coty, 262 U.S. 159, 163; 43 Sup. Ct. 531; 67 L. Ed. 922	4
Southern Power Co. v. North Carolina Public Service Co., et al., 263 U.S. 508; 44 Sup. Ct. 164; 68 L. Ed. 413	5
United States v. Johnston, 268 U.S. 220; 45 Sup. Ct. 496; 69 L. Ed. 925	4
United States v. Daniel J. Rimer, 220 U.S. 547; 31 Sup. Ct. 596; 55 L. Ed. 578	4
Cyclopedia of Federal Procedure, 2nd ed., Vol. II, Sec. 5414, pages 55-56	5
Moore's Commentary on the U. S. Judicial Code (1949), p. 584	5
Robertson & Kirkham on Jurisdiction of the Supreme Court of the United States (1951), Sec. 310, p. 588	5
Stern & Gressman on Supreme Court Practice (1950), p. 112	5
Address of Chief Justice Hughes before the American Law Institute, 20 A.B.A.J., p. 341	5
Address of Chief Justice Taft, 35 Yale L.J., p. 240	5
Article by Justice Felix Frankfurter, 48 Harvard Law Review, p. 238	5
Article by Henry M. Hart, Jr., 53 Harvard Law Review, p. 595	5

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Opinion Below

The opinion of the Court of Appeals is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered upon the 18th day of July, 1952 (R. 78). The Petition for Writ of Certiorari was filed on August 29, 1952. Notice of filing

was served upon Respondent September 5, 1952. Although not stated, it is assumed that jurisdiction of this Court is invoked under Title 28, U. S. C. A., Par. 1254.

Questions Presented

Whether or not the Circuit Court erred in affirming the judgment of dismissal by the District Court and its holding "that the real purpose of the suit is to set aside the conveyances" and that "the primary relief sought—cancelation of the deeds—will, if granted, directly and injuriously affect the rights of the grantees in said deed. These grantees are therefore indispensable parties".

Statement

The Circuit Court's opinion accurately states Petitioners' pleading; except it may be added that petitioners' jurisdictional allegations in the lower court applied only to the suit to cancel the deeds to land. It is alleged "The *matter in controversy* exceeds in value the sum of Three Thousand Dollars, *and lies within the Beaumont Division of this court.* Wherefore, this Honorable Court has jurisdiction of this cause." (R-2) (Italics ours).

Argument

Petitioners insist that the suit was "to annul two ultra vires acts—the acts of the corporation in executing two deeds of conveyances to land—and was not, as held by the District and Circuit Courts that "as plaintiffs below they sued said corporations to "annul conveyances by the corporation of its mineral interest". They further say that "If after hearing, the facts would not support the issuance of an in-

junction or the appointment of a receiver, these petitioners would not thereby be denied their right to be heard on their cause for legal services rendered said corporation", as was held by the court below. The suit was not one to recover a judgment for services rendered but to cancel deeds. The Circuit Court, after stating the nature of the suit, including petitioners' pleading (R-74) succinctly states the issues and its holding. There it is said:

> "A fair appraisal of the pleadings leaves us in no doubt that the real purpose of this suit is to cancel and set aside the conveyances above mentioned which appellant Baten, a stockholder in appellee, and appellants, Bowers and Gordon, appellee's former attorneys, regard as *ultra vires* and executed without adequate consideration, thus unlawfully dissipating appellee's assets, impairing Baten's rights as a stockholder, and leaving Bowers and Gordon nothing out of which to recover their attorney's fees. The whole matter boils down to an internecine struggle within the appellee corporation. The request appearing only in the body of the complaint to fix the status of Bowers and Gordon, and to determine the value of their services, is apparently intended to establish for them a status which would entitle them to seek a cancel-ation of the deeds. Without these allegations they could have no standing as plaintiffs. There is no prayer for a money recovery of attorney's fees.
>
> "The primary relief sought—cancel-ation of the deeds—will, if granted, directly and injuriously affect the rights of the grantees in said deeds. These grantees are therefore indispensable parties, as the trial court held. Shields v. Barrow, 58 U.S. (17 How.) 129, 15 L. Ed. 158; Garzot v. Rios de Rubio, 209 U.S. 283, 52 L. Ed. 794; Calcote v. Texas Pac. Coal and Oil Co. (CA-5) 157 Fed. (2d) 216; 167 A.L.R. 413, cert. den. 329 U.S. 782, 91 L. Ed. 671, rehearing denied, 329 U.S. 830, 91 L. Ed. 704; Vincent Oil Co. v. Gulf Re-

fining Co. (CA-5) 195 Fed. 434; Keegan v. Humble Oil and Ref. Co. (CA-5), 155 Fed. (2) 971; Lawrence v. Sun Oil Co. (CA-5), 166 Fed. (2) 466.

"The grantees in both deeds are citizens of Texas, as are also the plaintiffs below. Their joinder will therefore destroy diversity and with it the sole ground for federal jurisdiction of this suit. In these circumstances the suit was properly dismissed for lack of indispensable parties." (R. 76-77)

It is clear from the opinion of the Circuit Court as well as the petition for certiorari that the decision of the court does not involve principles, the application of which is of wide public or governmental interest. It presents only the question of construction of a pleading. The decision involves a question of concern only to the immediate parties, a question of no importance to the public. The judgment of the Circuit Court is correct and it is not in conflict with any other decision so as to warrant further review of the case by this Court.

Authorities

Layne & Bowler Corporation v. Western Well Works, Inc., et al., 261 U.S. 387, 393; 43 Sup. Ct. 422; 67 L. Ed., 712;

Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 Sup. Ct. 531; 67 L. Ed. 922;

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Address of Chief Justice Taft, 35 Yale L.J., p. 240;
Article by Justice Felix Frankfurter, 48 Harvard Law Review, p. 238;
Article by Henry M. Hart, Jr., 53 Harvard Law Review, p. 595.

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully sumitted,

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Attorneys for Respondent

Copy of this brief in opposition was on this the _____ day of September, 1952, mailed to W. O. Bowers, Jr. and W. D. Gordon, Petitioners.